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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1869

PETER H. BEER, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

and

JOHNNY JACKSON, JR., *et al.*,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLEES JOHNNY JACKSON, JR., *ET AL.*

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Appellees Johnny Jackson, Jr., et al., submit this Supplemental Brief with regard to *City of Richmond* v. *United States,* 45 L.Ed. 2d 245 (1975), and the adoption by Congress of Public Law 94-73 amending the Voting Rights Act.

On August 6, 1975, Congress extended sections 4 and 5 of the Voting Rights Act until August 6, 1982. The primary concern behind this extension was to subject future redistricting to the special scrutiny of section 5. During the first ten years of the Act more than one-third of all the Attorney General's objections under section 5 were to redistricting plans.[1] A total of 58 redistricting plans in

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[1] S.Rep. No. 94-295, p. 18; H. Rep. No. 94-196, p. 10; 121 Cong. Rec. S 13401 (Remarks of Sen. Tunney) (Daily ed., July 23, 1975); Hearing Before a Subcommittee of the Senate Judiciary

9 states were disapproved between 1971 and 1975 on the ground that they discriminated on the basis of race.[2] Congress concluded that state and local government officials who redrew district lines had, at best, failed to "take care to avoid discriminating against minority voters in that process." [3] The elimination of these discriminatory district-

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Committee, 94th Cong., 1st Sess., 582 (Statement of J. Stanley Pottinger) (1975); Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 170 (Statement of J. Stanley Pottinger) (1975).

[2] Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 95 (Statement of Frank Parker), 597-600 (Statement of J. Stanley Pottinger) (1975); 121 Cong. Rec. S 13669 (Remarks of Senator Kennedy) (Daily Ed., July 24, 1975).

[3] S.Rep. No. 94-295, p. 18; H. Rep. No. 94-196, p. 10.

Although past redistricting plans had generally been rejected under section 5 because of their discriminatory effect, there was little reason to believe this effect had been unintentional. As the Chairman of the United States Commission on Civil Rights testified:

> "Whites retain control of the political process in almost every jurisdiction studied by the Commission, despite the presence of substantial minority populations. Whites control decisions about who will work as election officials and when elections will be held; whether there will be districts for representatives bodies and how district lines will be drawn. That is, whites continue to control the procedures that often determine the outcome of elections . . .
>
> The Commission believes that the continuing high level of section 5 objections is evidence of the persistence with which some jurisdictions covered by the act continue to resist fulfillment of its purposes. The types of changes to which objections are most often made are not ad hoc responses to isolated events, but are carefully chosen methods of regulating the political system at the local or State level.
>
> It seems reasonable to infer that the politically experienced persons who institute those changes are aware of their discriminatory impact."

Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 75-76, 96 (1975); see also Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 28-29 (1975).

ing plans was a major factor in the increased number of non-whites elected to office.[4] As former Attorney General Katzenbach testified, "Section 5 has had its broadest impact . . . in the areas of redistricting and reapportionment. A substantial majority of the objections have been directed at this type of change. A redistricting plan or election system can be arranged so that a black candidate will have little chance of winning even with the full support of the black community. . . . Objections to this type of change, more than any other, have allowed blacks to achieve a greater measure of political self-determination." [5]

Congress recognized that such gerrymandering had become a major tactic for disenfranchising non-whites.[6] There

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[4] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1 (Statement of Senator Tunney), 3-4 (Statement of Senator Bayh), 8 (Statement of Senator Scott), 13 (Statement of Senator Hart), 21 (Statement of Senator Kennedy), 47 (Statement of Senator Mitchell), 72 (Statement of Senator Mathias), 74, 82, 89-90 (Statement of Arthur Flemming), 108 (Statement of John Lewis), 121 (Statement of Nicholas Katzenbach), 224 (Statement of Howard Glickstein), 539, 586-7 (Statement of J. Stanley Pottinger) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 7 (Statement of Sen. Rodino), 27, 35-6, 41 (Statement of Arthur Flemming), 173 (Statement of J. Stanley Pottinger), 330, 337 (Statement of Howard Glickstein) (1975).

[5] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 124 (1975).

[6] S. Rep. No. 94-295, pp. 16-18; H. Rep. No. 94-196, pp. 10, 18-19, 77-8, 99; 121 Cong. Rec. S 13401 (Remarks of Sen. Tunney) (Daily Ed. July 23, 1975); S 13668 (Remarks of Sen. Humphrey), S 13670 (Remarks of Sen. Kennedy) (Daily Ed. July 24, 1975); H 4708 (Remarks of Rep. Young), H 4710 (Remarks of Rep. Rodino), H 4712, H 4715 (Remarks of Rep. Edwards), H 4743 (Remarks of Rep. Roybal), H 4346 (Remarks of Rep. Jordan) (Daily Ed. June 2, 1975); H 4879 (Remarks of Rep. Badillo), H 4906 (Remarks of Rep. Conyers), H 4910 (Remarks of Rep. Stokes) (Daily Ed. June 4, 1975); Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1 (Statement of Senator Tunney), 16 (Statement

was ample evidence that, through the use of this and other devices, there had been, in the states covered by section 5, "a shift from a system in which black voters are excluded officially and with official sanction and encouragement, to one in which black voters are allowed to participate, but in which the election systems are such that they can't participate effectively, or have any great opportunity for success."[7] The testimony before both House and Senate Committees revealed that this gerrymandering took two forms: (1) the minority community was divided among several predominantly white districts or, (2) where this was not possible because of the large number of minority voters, a single overwhelmingly non-white district was created and the remaining non-white voters divided among predominantly white districts.[8] Congress knew that the practice of the Attorney General under section 5 was to object to both forms of gerrymandering.[9]

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of Senator Hart), 47, 51 (Statement of Clarence Mitchell), 75, 92 (Statement of Arthur Flemming), 129, 142 (Statement of Frank Parker), 225 (Statement of Howard Glickstein) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 23, 26, 41 (Statement of Arthur Flemming) 331, 340 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 204-327, 343 (1975).

[7] Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 629 (Statement of Howard Glickstein) (1975).

[8] Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 163-9, 180-86 (Mississippi Law Journal Article); 217 (Statement of Howard Glickstein) (1975); Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 340 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 204-327 (1975).

[9] See e.g. Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 553 (Statement of J. Stanley Pottinger), 667 (Letter of J. Stanley Pottinger disapproving New York redistricting), 677-8 (Letter of J. Stanley Pottinger disapproving Arizona redistricting); 1038 (Statement of Howard Glickstein) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 252, 262 (Statement of J. Stanley Pottinger), 1205, 1212, 1213-1218, 1224, 1272, 1273, 1277, 1281 (U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After); 1505-10 (D. Hunter, Federal Review of Voting Changes) (1975).

Senator Bayh explained that he understood this Court's decision in *City of Richmond* v. *United States*, 45 L.Ed 2d 245 (1975) to require

> that any redistricting plan in an area covered by section 5 of the act must afford minorities "representation reasonably equivalent to their political strength" (43 U.S.L.W. 4865, 4868). This means that where blacks are more than 40 percent of the population as in Richmond, section 5 requires a redistricting plan in which a comparable portion of the seats have substantial black majorities.
>
> Section 5 is designed to go beyond the constitutional standard required by the 14th and 15th amendments and is justified as necessary to put a stop to the practice of gerrymandering districts or adopting at-large systems so that blacks rarely or never win elections. The committee's interpretation of the legal standards for redistricting cases under section 5 was spelled out in detail in the hearings before our committee by Mr. Howard A. Glickstein the former staff Director of the Civil Rights Commission.[10]

The Glickstein memorandum to which Senator Bayh referred stated,

> [T]o the extent that it is realistically feasible to draw a line which does not divide the minority com-

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[10] 121 Cong. Rec. S 13665 (Daily Ed., July 24, 1975).

> munity and thus does not dilute the value of minority votes, Section 5 requires that this be done . . . . [W]here the non-white population is so large that they will inevitably control at least one district, an attempt may be made to put as many non-white voters as possible in that one district so as to prevent substantial non-white concentrations in the surrounding districts. The application of Section 5 will prevent such overloading of one district . . . .[11]

It was with an awareness of this established construction of section 5 that Congress extended the Act until 1982 for the express purpose of covering the redistricting that would follow the 1980 Census,[12] in the hope that such coverage would afford minority voters a reasonable opportunity to increase the still negligible number of non-white elected officials in section 5 jurisdictions.[13]

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[11] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1039 (1975).

[12] S. Rep. No. 94-295, p. 18; H. Rep. No. 94-196, p. 10; 121 Cong. Rec. S 13340 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975), S 13400 (Remarks of Sen. Kennedy), S 13402-04 (Remarks of Sens. Byrd, Pastore, and Tunney) (Daily Ed., July 23, 1975), H 4756 (Remarks of Rep. Clay) (Daily Ed., July 2, 1975), H 4830 (Remarks of Rep. Kastenmeier) (Daily Ed., June 3, 1975); Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 4, 11 (Statement of Rep. Rodino), 29 (Statement of Arthur Flemming), 642-3 (Statement of Armand Derfner) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 8 (Statement of Sen. Scott), 16-17 (Statement of Sen. Hart), 79, 98-99 (Statement of Arthur Flemming), 146 (Statement of Frank Parker), 226 (Statement of Howard Glickstein) (1975).

[13] S. Rep. No. 94-295, p. 14; H. Rep. No. 94-196, p. 7; 121 Cong. Rec. S 3337-9 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975), S 13668 (Remarks of Sen. Humphrey), S 13669 (Remarks of Sen. Kennedy) (Daily Ed., July 24, 1975), H 4712, H 4714, H 4717 (Remarks of Rep. Edwards), H 4756 (Remarks of Rep. Clay) (Daily Ed. June 2, 1975), H 4829 (Remarks of Rep. Collins) (Daily Ed., June 3, 1975); Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 3-4 (Statement of Sen. Bayh), 9 (Statement of Sen. Scott), 13 (Statement of Sen. Hart), 72 (Statement of Sen. Mathias), 89-90 (Statement of Arthur Flemming), 109 (Statement of John Lewis), 125 (Statement of Nicholas Katzenbach), 127-28, 141-42 (Statement of Frank Parker), 224 (Statement of Howard Glickstein), 539, 586-87 (Statement of J. Stanley Pottinger) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 7 (Statement of Rep. Rodino), 21-22, 35-36 (Statement of Arthur Flemming), 173 (Statement of J. Stanley Pottinger), 330, 337 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 61-67, 337, 377-395 (1975).

This case presents a classic illustration of the type of discriminatory districting which Congress intended to prevent. Although it would clearly have been "realistically feasible" to draw east-west city council lines which did not divide the non-white community, Plans I and II did just the opposite. Brief for Appellees Johnny Jackson, Jr., et al., 14-22. The all-white New Orleans City Council made no effort whatever "to take care to avoid discriminating." Id., pp. 22-26. The United States Commission on Civil Rights, in a report[14] referred to on the floor of the House[15] and Senate [16] and reproduced in full in the House hearings,[17] detailed the provisions of Plan II as an example of racial gerrymandering. The Senate Report expressly mentioned the instant case:

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[14] The Voting Rights Act: Ten Years After, pp. 287-91 (1975).

[15] 121 Cong. Rec. S 13086-88 (Remarks of Sen. Tunney) (Daily Ed., July 21, 1975), S 13338 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975).

[16] 121 Cong. Rec. H 4721-22 (Remarks of Rep. Edwards) H 4723, H 4730 (Remarks of Rep. Butler), H 4756 (Remarks of Rep. Clay) (Daily Ed., June 2, 1975).

[17] Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 969-1466 (1975).

> In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are within the reach of Section 5. . . . For example, as in *Beer* v. *U.S.*, 374 F.Supp. 363 (D.D.C., 1974), Section 5 requires submission of the entire seven member council plan when New Orleans sought approval for a reapportionment of only the five single-member seats.[18]

The Glickstein memorandum referred to this disapproval of Plans I and II as an illustration of the application of section 5 to "prevent the fragmentation of minority communities and the resulting dilution of minority votes".[19]

The decision of the district court in disapproving the two at-large seats is supported by this Court's decision in *City of Richmond* v. *United States,* 45 L.Ed. 2d 245 (1975). In *City of Richmond* both the Attorney General and the Court required, as a condition for approving the annexation, that the City end its practice of electing the city council at large, even though that practice had existed long before enactment of the Voting Rights Act. 45 L.Ed. 2d at 256. See also *City of Petersburg* v. *United States,* 354 F.Supp. 1021, 1031 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973). This condition was imposed within the power of the Attorney General and the judiciary to minimize the discriminatory impact of a proposed change. In the instant case it would be difficult at best to draw lines for 5 city council districts which would give non-white voters representation in the 7 member council "reasonably equivalent to their political strength" in the city. 45 L.Ed. 2d at 256. The district court did not err in holding that, if this could

[18] S. Rep. No. 94-295, p. 19.

[19] Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1038-40 (1975).

not be done, any set of districting lines would have an impermissible discriminatory effect unless the at-large seats were abolished.

CONCLUSION

For the above reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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